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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 603

MARION G. DENTON AND VALEDIA W. DENTON, d/b/a Marden Manufacturing Company, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the decree of that Court entered December 9, 1954, modifying and enforcing, as modified, an order of the National Labor Relations Board.

OPINIONS BELOW

The decision and order of the National Labor Relations Board (R 80) are reported at 106 NLRB 247 and are printed in Appendix B hereto, *infra,* p. 3. The opinion of the Court of Appeals (R 153) printed in Appendix B hereto, *infra,* p. 13, is reported in 217 F. 2d 567.

JURISDICTION

The decision of the Court of Appeals was rendered and its decree entered December 9, 1954 (R 153, 162). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the failure of the petitioners to accede to specified union demands, while agreeing to others and making counter proposals to still others, during brief bargaining sessions held on each of three days is sufficient evidence of a refusal to bargain collectively as required by Section 8 (a) (5) of the National Labor Relations Act where it is found also that the petitioners had previously interfered with their employees in violation of Section 8 (a) (1), discriminatorily discharged employees in violation of Section 8 (a) (3) and (1), and stated that they would never sign a contract with the union.

2. Whether the court below departed from the "substantial evidence" requirement of Section 8 (c) of the National Labor Relations Act in declining to reject the findings of the Board that the petitioners discriminatorily discharged employees Walter Lassiter and Calvin Singleton.

STATUTE INVOLVED

The statutory provisions involved are Section 8 (a) (1), (3), and (5), Section 8 (d), and Section 10 (b), (c), and (e) of the National Labor Relations Act as amended by the Labor Management Relations Act, 61 Stat. 140, 142, 146, 147, 29 U.S.C., §§ 158 and 160. The pertinent text of such provisions is printed in Appendix A, *infra*, p. 1.

STATEMENT OF THE CASE

Jurisdiction of Federal Court

This case came before the Court of Appeals upon petition of the National Labor Relations Board filed February 1, 1954, for enforcement of its order directed October 29,

1953, to the petitioners (R. 4).* The jurisdiction of the Court of Appeals was invoked by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

Petitioners' Business

The petitioners are a partnership engaged in the manufacture and sale of brush- and weed-cutting machinery at Auburndale, Florida (R 97). They normally employ about 21 persons in their operation (BA 9).

Union's Entry Into Petitioners' Plant

The conduct of the petitioners found to constitute unfair labor practices took place in the spring and early summer of 1952 as a result of a campaign of the United Steel Workers, CIO, to organize their employees. The Steelworkers (hereinafter called the "Union") apparently began their activities among the petitioners' employees about February, 1952 (R 6). On May 5, the production and maintenance employees voted for the Union which was, therefore, certified on May 13 as their exclusive bargaining representative (R 18, 21).

Petitioners' "Interference" With Employees

The Board found that, during the period preceding the election of May 5, the petitioners interfered with their employees through coercive interrogation and intimidation of them by Marion Denton, one of the petitioners, and by Brewster, the foreman (R 80-81, 98-104). Most of

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* The designation "R" indicates a reference to the record certified by the clerk of the court below under the caption "Transcript of Record." Other designations of record references are used herein: "BA" refers to the appendix filed with the court below by the Board as "Appendix to Brief for Petitioner", and "PA" refers to the appendix filed therewith by the petitioners as "Appendix to Respondents' Brief", both of which have been appropriately certified. The three certified portions of the record are filed herein with this petition pursuant to Rule 21.

the facts of such conduct and all the implications of its impropriety were denied at the hearing by Denton and Brewster, and by some of the Union members who were witnesses for the General Counsel (PA 19, 26-27, 73, 78, 80-81). The Board, however, chose to believe other witnesses and to draw other inferences. Denton himself testified that he had told the assembled employees a few days before the election that he would not sign a union contract (BA 152-153).

Lay-Off of Employees Before Strike

After the election, the petitioners laid off three employees effective May 9, (R 104, 105, 107). The Board was unable to conclude that one of the three, David Lassiter, was the object of discriminatory treatment (R 83, 104-105). It found that the others, Walter Lassiter and Calvin Singleton, were discriminatorily discharged or laid-off against the petitioners' contention that all three had been laid off as those least efficient employees who should go in a reduction in force required to restore the normal level of employment at the plant (R. 83, 105-109).

Discharge of Employee Before Strike

On May 23, the petitioners discharged H. D. Lassiter for excessive absenteeism and drinking on the job (R 156). The General Counsel adduced testimony designed to show that this discharge was discriminatorily motivated, and the Board so found (R 83-86, 110-114).

Collective Bargaining

Representatives of the petitioners and of the Union met on three occasions for negotiation of a labor contract (R 81, 114-116).

The first meeting held on May 25 was preliminary and very short (R 114; BA 106). The Union presented a proposed contract which the petitioners' representative read, but it was not discussed in detail (R 114).

The next meeting was on June 4 (R 114). It was "very amiable" and was the longest of the bargaining sessions, lasting an hour or even two hours (PA 52; BA 22, 110). During its course, the petitioners agreed to provisions respecting recognition, the composition of the bargaining unit, the maintenance of a bulletin board for union notices, their responsibility for the safety and health of employees, hours of work, and overtime pay (R 114-115). Also, the petitioners thought that agreement had been reached upon a proposal for a probationary period during which new employees might be discharged without consultation with the Union, whereas the Union mistakenly believed that the agreement related to a union-training program (R 115). The petitioners' representative rejected union-shop and check-off provisions but promised to discuss with Denton the type of union-security clause which they would accept (R 115; BA 23). They rejected the Union's proposal for a wage increase without counter-proposal, and the Board found, despite the petitioners' testimony otherwise, that they similarly denied a request for paid vacations and holidays (R 81, 86, 115; BA 124). They were willing to incorporate a provision for grievance procedure "only on condition that no international representative should participate in grievance presentations", according to the Board's finding (R 81, 115). In this connection, however, the Union's principal negotiator testified that the petitioners' representative "said we might be able to work out some agreement on arbitration" but that the petitioners would not agree to it "at the present time" (BA 25). The petitioners also counter-proposed separate seniority lists for hourly workers and piece workers, according to one of the Union representatives (PA 53; BA 112). This same man testified in effect and without contradiction that, at the close of the second meeting, it was agreed that the Union representatives would take some of the petitioners' proposals up with the Union before the next meeting (PA 54-55).

On June 25, the negotiators met for about 20 minutes (R 116; BA 114). The Union representatives hurriedly read through the proposed contract, and asked, article by article, whether the petitioners' position had changed (R 116; BA 118). The petitioners' representative answered that they had not changed their minds on those things he had definitely decided upon (R 116). During the reading of the contract, a heated dispute arose over the misunderstanding of the parties at the meeting of June 4 as to the proposal for a probationary period (R 116). The acrimony subsided, however, and the reading of the contract proceeded (R 116). Lacking achievement, the Union representatives closed the meeting by leaving (R 116).

With nothing further, the Union at a meeting on June 30 heard from its representatives a report in detail of the "lack of progress made in the negotiations" and voted to strike the following morning, July 1 (R 118). The decision was telephoned later that night to one of the petitioners' bargaining representatives who replied that the Union could take or leave the petitioners' proposal and that, if the employees should strike, they would come back (R 119).

The strike started July 1 as scheduled (R 119).

"Exclusion" of Member of Union Negotiating Committee From Bargaining Sessions

At either the meeting of May 27 or June 4, a Union representative asked one of the petitioners' representatives for his *permission* that H.D. Lassiter attend the meeting (R 116). Lassiter, who had been elected a Union representative after his discharge on May 23, had gone to the meeting place with the other Union representatives and was in an automobile outside, awaiting word as to his participation in the session (R 116). The petitioners' representative refused to give his permission on the ground that he was no longer an employee of the petitioners (R 116). Lassiter attended none of the bargaining conferences (R 114-116).

The Strike and the Strikers' Discharge

Following the commencement of the strike on July 1, the plant was shut-down until July 7 (R 81, 119). On that day, a number of striking employees returned to work along with five new employees (R 119). In the meanwhile, seven strikers had been discharged on July 2 for "failure to report to work"; another was discharged for the same reason on or before July 8; and a third on or before July 9 (R 119). On the latter date three employees, who the Board found were a committee representing all the strikers, met with Denton in the morning, told him that the strike had been called off, and notified him that the strikers were ready to return to work unconditionally (R 121). Denton declined to reinstate anyone at that time, stating that he had hired replacements (R 121). Later on July 9, another "committee" consisting of four men attempted to see Denton but were told by the petitioners' superintendent that Denton would not talk to any of them and that new employees had been hired to take their places (R 112). One of the members of the second committee was reinstated by the petitioners October 18, 1952, and a member of the first committee was unconditionally reemployed by them November 6, 1952 (R 125, 87).

Findings and Order of Board

Upon the foregoing facts, the Labor Board found that the petitioners had engaged in unfair labor practices including refusal to bargain with the Union in violation of Section 8 (a) (5) of the National Labor Relations Act and discrimination in the hire and tenure of employees in violation of Section 8 (a) (3) and (1) of the Act (R 81, 118, 105). It ordered the petitioners to cease and desist from such practices and to take affirmative action, including reinstatement of all the employees who were discharged July 9 at the close of the strike, which it found to be an unfair labor practice strike, and who have not been reinstated; reinstatement of Walter Lassiter, Calvin Singleton,

and H.D. Lassiter; and making those employees and all others discharged at the close of the strike whole for the loss of pay (R 88).

Opinion and Decree of Court Below

The court below concluded that the Board's findings and order in all respects but one were entitled to enforcement as supported by substantial evidence on the record considered as a whole within the authority principally of *N.L.R.B.* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134-135 (CA 1), and of *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (R 158, 159). The single exception was in respect of the Board's order of reinstatement and back pay award to H. D. Lassiter wherein it held that the Board's finding of discriminatory discharge was not supported by substantial evidence, citing *N.L.R.B.* v. *Fulton Bag & Cotton Mills*, 175 F. 2d 675, 677 (CA 5), and other cases (R 160). Accordingly, it modified the Board's order so as to exclude relief to H. D. Lassiter and decreed enforcement of the order as thus modified (R 161).

REASONS FOR GRANTING THE WRIT

The court below holds that the failure of the petitioners to accede to proposals of the Union upon certain subjects when considered in the light of the petitioners' prior violations constitutes substantial evidence of failure to comply with the good faith bargaining requirement of Section 8 (a) (5) of the National Labor Relations Act. The petitioners ask the Court to review especially this holding on the ground that the court below has decided a federal question in a way conflicting with *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, and *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395.

Never since *Jones & Laughlin* has it been doubted that the National Labor Relations Act does not compel any agreement whatever. Here the necessary consequence of the holding of the court below is that an employer with a

"bad" labor background must agree with the union in collective bargaining somewhere in the fields of wages, grievance procedure, union security, check-off, and paid vacations and holidays. If he does not, even though bargaining has extended over only three or four hours and he has agreed upon proposals outside these fields and made unanswered counter-proposals upon some of the Union demands in these areas, there is sufficient evidence of violation to subject him to the sometimes ruinous remedies of the law.

To permit a union or, now, an employer to run to the Labor Board with assurance of success whenever the one party does not accede to the demands of the other would plainly tend to destroy the very bargaining which the Act was designed to protect. Here the prejudice to the law is aggravated beyond the ordinary case, however, for the evidence of conditions transpiring during the negotiating periods is barren of any trace of a disposition on the part of the petitioners not to bargain in good faith with the purpose of arriving at an agreement.

There was no delay in the meetings for bargaining. The petitioners met with the Union representatives upon prearranged times. There was no reopening of any question previously settled except upon the mistake of the Union. There was but one instance of ill feeling in the meetings, and that was expressed mutually by a representative of the petitioners and a representative of the Union and arose from a mistake of the Union. When the negotiations were terminated, it was the Union which terminated them. Most important, the petitioners accepted many Union proposals and made counter-offers to others.* These conditions all

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* The trial examiner and the Board found that the petitioners did in fact make counter-proposals (R 81, 115) but not all that were actually made, such as that upon seniority testified to by representatives of both parties (PA 53; BA 112). The court below does not mention this circumstance, one of the strongest indicia of good faith. *Hearings before Senate Committee on Labor and Public Welfare on S. 1126 and S. 55, 80th Cong., 1st Sess.*, p. 1914 (1947).

point to good faith on the part of the petitioners. See Note, *Good Faith Bargaining in Labor Negotiations,* 61 Harv. L.R. 1224.

The court below attached no significance to the petitioners' conduct at the bargaining conferences. Indeed, it did not even consider this conduct except in respect of the acceptance of some Union demands. It found that the petitioners had made only "nominal and illusory 'concessions' during these conferences with regard to the grant of plant bulletin board space to the union, recognition of the appropriate bargaining unit, overtime pay, and assumption of responsibility for maintaining plant health and safety conditions" (R 157). The court explained its characterization of these concessions as "more or less nominal and illusory, principally because practically all of them were independently required either by Federal or Florida state law" (R 157, fn. 5).

The simple fact is there is not one scintilla of evidence in this record to support the court's finding that any of these concessions was required by law. It is true that the Fair Labor Standards Act imposes minimum standards for hours to be worked without overtime pay, but there is no showing here which warrants a finding that the concession of the petitioners embodied *only* those standards. It is also true that Florida requires employers to assume responsibility for maintaining the health and safety of employees while at work. But, again there is absent from this record any indication that the concession of the petitioners in this respect was confined to a mere acceptance of the broad responsibility as expressed in Florida statutes. Also, if it be true that the definition of the bargaining unit is a matter exclusively within the competence of the Labor Board, which the petitioners doubt, then the counter-proposal of the petitioners that the bargaining unit be described in the language of the Board perhaps saved any contract which might have been agreed upon from the taint of illegality. That is hardly evidence of bad faith. And

the circumstances here are a far cry from *Reed & Prince* where many incidents connected with the bargaining in 13 meetings extending over four months beyond the mere rejection of union demands entered into the judgment of guilty of refusing to bargain in good faith.

The rule of *Jones & Laughlin* against a requirement of agreement in collective bargaining has recently been reaffirmed in *National Labor Relations Board* v. *American National Insurance Co.* where this Court found that the court below had correctly applied the good-faith test of bargaining. The court below has even more recently adhered to that test in a factual situation not unrelated to that of the instant case. *National Labor Relations Board* v. *National Paper Co.*, 216 F. 2d 859. The record of the courts in general and of the court below in particular in applying this standard should not now be marred by permitting the decision here to stand without review. See *National Labor Relations Board* v. *I.B.S. Mfg. Co.*, 210 F. 2d 634, 637-638 (CA 5); *National Labor Relations Board* v. *National Shoes*, 208 F. 2d 688, 691 (CA 2); *National Labor Relations Board* v. *Tower Hosiery Mills*, 180 F. 2d 701, 706 (dissenting opinion) (CA 4).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BURR TRACY ANSELL,
Counsel for Petitioners.

A. R. SURLES, JR.,
Of Counsel.

APPENDIX A

Statutory Provisions

The National Labor Relations Act, as amended by the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C. § 141 et seq., provides in pertinent part as follows:

Sec. 8 (a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Sec. 8 (d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

Sec. 10 (b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, * * *

Sec. 10 (c). The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the

complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *

Sec. 10 (e). The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. * * *

APPENDIX B

Decision and Order

United States of America
Before the National Labor Relations Board
Marion G. Denton and Valedia W. Denton
d/b/a Marden Manufacturing Company
Case No. 10-CA-1523

and

United Steelworkers of America, CIO

On July 13, 1953, Trial Examiner Stephen S. Bean issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices, and recommending that they cease and desist therefrom and take certain affirmative action as set forth in the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report and a supporting brief.[1]

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committeed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondents' exceptions and brief, and the entire record in this case, and hereby adopts the findings,[2] conclusions,

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[1] The Respondents' request for oral argument is denied because the record and the Respondents' exceptions and brief, in our opinion, adequately present the issues and positions of the parties.

[2] We note and correct the following factual inaccuracies in the Intermediate Report which do not affect our findings or conclusions in this case: (1) the Trial Examiner found that foreman Brewster called two employee meetings on May 2, 1952, whereas in fact he summoned employees to but one meeting on that date; (2) the Trial Examiner found that foreman Brewster stated that Denton would move to California on account of the health of Denton's wife, whereas in fact Brewster stated that he (Brewster) would move to California on account of the health of his wife; (3) the Trial Examiner found that sometime in May, Denton told Keefer he had had a beer or two, whereas in fact it was H. D. Lassiter who made the statement to Keefer with regard to

and recommendations of the Trial Examiner, with the following additions and modifications:

1. The General Counsel offered in evidence at the hearing copies of (1) the charge and amended charge in this case, (2) the complaint, and (3) notice of hearing, together with various documents purporting to show that such papers were mailed to and received by the Respondents or that delivery thereof was refused by Respondents. Respondents objected to the receipt of all these matters in evidence on the ground, *inter alia*, that the foregoing proofs of service or of refusal of delivery were not properly authenticated. Respondents' objection was overruled by the Trial Examiner, and Respondents except. Respondents do not show how they were prejudiced by this ruling. There is no issue in the cases as to the adequacy of the Respondents' opportunity to prepare a defense and meet the charges against them. The Respondents filed a timely answer to the complaint, appeared at the hearing, and fully participated in the litigation of all the issues. Nor is there any issue as to whether the original charge was in fact received by the Respondents. One of the documents introduced in evidence was an affidavit of mailing of a copy of the original charge to the Respondents by registered mail, to which affidavit was attached a return receipt therefor purporting to be signed by Respondent Marion Denton. Respondents do not contend that this material was not received by them. Denton, although testifying at the hearing, was not questioned by his counsel about this signature. Under these circumstances, we find no merit in Respondents' exception on this point.

Respondents' counsel also objected at the hearing to the examination of Respondent Marion Denton concerning instructions given by him to counsel regarding the conduct by the later of negotiations with the Union. The objection,

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his (Lassiter's) drinking; and (4) the Trial Examiner found that the Respondents refused to bargain with the Union since May 13, 1952 (the date of the Union's certification), whereas the record shows, and we find, that the respondents' refusal to bargain dates from May 27, 1952 (the date of the first negotiation meeting of the parties).

which was based on client-attorney privilege, was overruled by the Trial Examiner and Respondents except. The Trial Examiner did not rely upon the foregoing testimony in finding that the Respondents violated Section 8 (a) (5) of the Act, nor do we. Accordingly, we find that any possible error in admitting this testimony was not prejudicial.

Respondents also except to: (1) the Trial Examiner's conduct of the hearing in that he allegedly permitted representatives of the Union to be seated inside the bar in a position to coach and encourage witnesses; (2) the absence from the hearing during its latter stages of E. V. Riffe, a representative of the Union, despite the fact that Riffe had been subpoenaed to appear; and (3) to the "evident prejudice of the Trial Examiner in favor of General Counsel and the Charging Union." As to (1), the record shows that only Riffe, a representative of the charging union whose appearance was noted on the record, was permitted to be seated inside the bar; and, with respect to the instances of alleged coaching relied upon by the Respondents, the record shows either that the Trial Examiner ascertained that the witness was not aware of such alleged coaching, or that he cautioned against it; as to (2), the record does not show that any request was made by the Respondents for enforcement of the Riffe subpoena, nor that any continuance of the hearing was requested for that purpose. Riffe did, in fact, appear at the early stages of the hearing as a witness for the General Counsel and was cross-examined by the Respondents. Moreover, Respondents have so far failed to state for what purpose they desired Riffe's further testimony; as to (3), the general allegation of the Trial Examiner's prejudice in favor of the General Counsel and the Union is not supported by the record. Accordingly, we find no merit in these exceptions.

2. We agree with the Trial Examiner that the Respondents discriminatorily discharged Walter Lassiter and Calvin L. Singleton. Because no exception has been filed thereto, we also adopt the Trial Examiner's finding that the General Counsel failed to sustain the burden of proving that Respondents discriminated in the hire and tenure of employment of David Lassiter.

3. We also agree with the Trial Examiner's finding that the discharge of H. D. Lassiter was discriminatory. However, in so finding, we rely only upon the following:

H. D. Lassiter, the father of David Lassiter and Walter Lassiter, was hired in August 1948. He operated the Respondents' turret lathe, a key operation requiring a skilled operator. He was a member of the Union, a fact which he himself revealed to Respondent Marion Denton. He was outspoken in his support of the Union. On one occasion, in front of the employees assembled to hear Denton's anti-union remarks, which are set forth in the Intermediate Report, he was the only employee who spoke up on behalf of the Union. Denton, in a conversation with another employee, referred to H. D. Lassiter as a union "ring-leader."

Shortly before the May 5, 1952, election at the Respondents' plant, Lassiter was told by Denton that the Union could "affect" him and his sons; and Albert Brewster, a supervisor, told Lassiter that if the Union won the election the plant would be shut down and Lassiter and his sons would lose their jobs. Shortly after the election Lassiter's two sons were discharged, one of them, as found above, discriminatorily. Lassiter himself was discharged on May 23.

In its brief, the Respondents contend that Lassiter was discharged because of drunkenness on the job and absenteeism caused by his drinking. Respondent Marion Denton, however, testified only that Lassiter was discharged for absenteeism.

As set forth in the Intermediate Report, for a number of years before his discharge, Lassiter, as well as practically all the other employees and their foreman had been in the habit of drinking beer during working hours. In May 1952, Lassiter was found to have been drinking on the job, and was warned about such conduct. The record also shows that Lassiter was absent 47 days in 1951, and 28 days in 1952, including 4 days of unexplained absence during the week in which he was discharged.

However, like the Trial Examiner, we are convinced that the reasons advanced by the Respondents were not the motivating cause for Lassiter's discharge. The contention

in Respondents' brief that Lassiter was discharged for drinking on the job is contradicted by Denton's own testimony that Lassiter was discharged for absenteeism. Moreover, while Lassiter was warned against drinking on the job shortly before his discharge, there is no evidence that he was thereafter guilty of such misconduct. Furthermore, as already stated, whatever drinking he indulged in prior to that warning was in conjunction with other employees and his foreman, a plant practice which, strange as it may seem, had been tolerated by the Respondents for a number of years. There is no evidence that any other employee was ever disciplined for drinking.

With regard to the contention that Lassiter was discharged for absenteeism, the record shows that, despite Lassiter's record of absences in 1951 and 1952, no issue was ever made of his absenteeism by the Respondents until shortly after the Union had won the election. Although absent without explanation four days during the week in which he was discharged, Lassiter's record shows that at other times he had weekly absences of 3, 4, and 5 days; and on one occasion he was absent an entire week.

Under these circumstances, and especially in view of the fact that the threats by Denton and Brewster against Lassiter and his sons were in fact carried out against the sons—in one case discriminatorily—, and because of the timing of Lassiter's discharge so soon after the Union's victory in the election, we believe the inference is inescapable that the asserted reasons for the discharge are pretexts, and we are convinced that Lassiter was discriminatorily discharged because of his membership in, and outspoken sponsorship of, the Union.

4. We agree with the Trial Examiner's conclusion that the Respondents refused to bargain collectively with the Union in violation of Section 8 (a) (5). However, in so finding, we do not adopt a possible implication present in one part of the Intermediate Report that the Respondent's failure to make concessions to the Union with respect to wages or financial benefits was *per se* a refusal to bargain within the meaning of the Act, rather than only "a material factor" in assessing good faith. Nor do we find it necessary to consider, or pass upon, the Respondents'

refusal to allow the Union to bring a tape recorder to a bargaining session, in concluding that there was a refusal to bargain in violation of Section 8 (a) (5).

5. Like the Trial Examiner, we find that the strike that occurred at the Respondents' plant was an unfair labor practice strike caused by the Respondents' failure to bargain in good faith and by their refusal to reinstate employees who had been discriminatorily discharged. Accordingly, we find that Grady Carroll, Melvin Purvis, R. B. Granger, J. D. Story, A. C. Letchworth, H. N. Wells, T. C. Singleton, W. W. Singleton and J. R. Smith were unfair labor practice strikers and that the Respondents' refusal to reinstate these employees on July 9, when they unconditionally applied for reinstatement, was discriminatory.

In view of our determination that the strike was an unfair labor practice strike, we need not pass upon the Trial Examiner's statement by way of dictum concerning the applicable law if the strike be regarded as an economic strike from its inception.

The Remedy

We do not agree with the Trial Examiner's conclusion that the Respondents unlawfully conditioned the reinstatement of W. W. Singleton upon his withdrawal of a claim for overtime pay. As the Trial Examiner found, Singleton was reinstated on November 6, 1952, on his own application. On the next day, he was asked by Respondent Marion Denton to withdraw a previously-filed wage claim for overtime pay. After refusing to withdraw the claim, Singleton, without explanation, failed to report for work the next day or thereafter.

In the absence of further evidence bearing on this issue, we find, contrary to the Trial Examiner, that Singleton's compliance with Denton's request was not a condition, either express or implied, of his continued employment by the Respondents.

Accordingly, we find that Singleton was reinstated on November 6, 1952, and thereafter voluntarily left the Respondents' employ. For this reason we shall not order

his further reinstatement, as the Trial Examiner recommended. We shall, however, order that Singleton be made whole, in the manner set forth in the section of the Intermediate Report entitled "The Remedy," for any loss of pay he may have suffered from July 9, 1952, the date of the Respondents' discrimination against him, to November 6, 1952, the date of his reinstatement.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Marion G. Denton and Valedia W. Denton, d/b/a Marden Manufacturing Company, of Auburndale, Florida, their agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in United Steelworkers of America, C.I.O., or in any other labor organization of their employees, by discharging or refusing to reinstate any of their employees, or by discriminating in any other manner in regard to the hire and tenure of employment of their employees or any term or condition thereof;

(b) Refusing to bargain with the above-named labor organization as the exclusive representative of all production and maintenance employees, including truck drivers, at their Auburndale, Florida, plant, excluding office employees, professional employees, guards or watchmen, and supervisors as defined in the Act;

(c) Threatening employees with the closing and removal of their business and with other reprisals for engaging in union activity; promising employees rewards for refraining from union activity; interrogating employees as to their union affiliations or activities; or soliciting employees to keep under surveillance, and report, union activities;

(d) In any other manner, interfering with, restraining, or coercing their employees in the exercise of their right to self-organization, to join or assist United Steelworkers